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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 371

NATIONAL BROADCASTING COMPANY, INC.,

Petitioner,

v.

PHILCO CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONER

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The theme of respondent's opposition, which is repeated throughout its argument, is that the decision below was a routine "application of the well-established legal test regarding standing".[1] Respondent stands alone in urging this view. Even the majority of the court below recognized that its decision is unprecedented. Judge Fahy's opinion states that whether or not respondent has standing is a question which "has not before arisen in the present context. Drawing the 'party in interest' line is a difficult process." Petition, pp. 4a-5a, R. 98-99. The dissenting opinion characterized the result below as "completely unjustified" (Petition, p. 6a, R. 100), and the Federal Communications Commission held that granting Philco standing "would make a mockery of the concept of 'party in interest'" (Petition, p. 13b, R. 86-87).

[1] Respondent's Brief in Opposition, hereafter abbreviated "Res. Br.", p. 6.

Respondent's assertion that the question here presented "has been authoritatively settled by this Court" (Res. Br., p. 7) is also in error. The only decision of this Court cited in respondent's brief is *Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 U. S. 470, decided a dozen years before the protest section was enacted in 1952. There, the Commission permitted the owner of an existing station to intervene as a party in the proceedings before it, but contended that the station owner was not entitled to appeal the resulting order. This Court's holding that the station owner was a "person aggrieved" by the issuance of a permit to construct a new station to serve the same area (an "aggrievement" so serious that it might have deprived the public of an existing broadcast service) is obviously not authority for the decision below, as the majority itself recognized (Petition, pp. 4a-5a, R. 98-99).

Neither *Sanders* nor any of the lower court cases cited by respondent have held that one who has no economic or competitive interest in the broadcasting industry may qualify as a "party in interest" entitled to protest or appeal Commission action. Philco admittedly has no such interest, but seems to argue that the nature of its business or "occupation" is irrelevant (Res. Br., p. 8).[2] This, of

[2] This Court has recognized the validity of an "occupational" test for determining standing. See *L. Singer & Sons* v. *Union Pacific Railroad Co.*, 311 U. S. 295, which held that the plaintiffs were not "parties in interest", quoting with approval the following language of the lower court:

> "• • • we think it may safely be said that the proposed extension of defendant's lines may adversely affect the plaintiffs' welfare. We are of the opinion, however, that their complaint discloses that their welfare cannot be directly, but only indirectly and consequentially, affected by the proposed extension. They are not in competition with the defendant. They are not engaged in the transportation business." (p. 301)

course, is the logical result of the decision below—a result which (as we have shown at pages 12 to 15 of the petition) does violence to the "party in interest" concept as previously construed.

Respondent cites four authorities in support of its position (Res. Br., p. 9). These may be dealt with briefly.

City of Pittsburgh v. *Federal Power Commission*, 237 F. 2d 741 (D. C. Cir. 1956), was an appeal from a Federal Power Commission order, in a proceeding to which appellants had been parties, authorizing the abandonment of a natural gas pipeline and the construction of substitute facilities. The City of Pittsburgh claimed appellate status as a consumer of natural gas adversely affected by the order complained of, which would have resulted in increased rates to consumers in a rate-regulated industry. We have already shown that such consumer cases are inapplicable (Petition, pp. 16-17). That discussion need not be repeated here since, in any event, the decision below was not based on any contention that Philco is affected as a consumer. *Reade* v. *Ewing*, 205 F. 2d 630 (2d Cir. 1953), is another consumer case and is inapplicable for similar reasons.

City of Pittsburgh also held that certain barge operators, who transported petroleum products in competition with the applicant, had standing to appeal because the authorization would cause them direct and substantial injury in that competitive business. Since Philco admittedly does not compete in the regulated area here involved, it cannot claim any similar injury and can derive no comfort from this holding.

Clarksburg Publishing Co. v. *Federal Communications Commission*, 225 F. 2d 511 (D. C. Cir. 1955), is another competitor case which has no application here for reasons already stated (Petition, p. 12, footnote 11).

Respondent's only other authority is "*Associated Industries* v. *Ickes*, 134 F. 2d 694", greatly relied on as having "laid to rest" any concern this Court might otherwise have for congested calendars in the Commission and the courts (Res. Br., p. 11). The Second Circuit there held, largely on the basis of its interpretation of this Court's opinion in the *Sanders* case, that a Bituminous Coal Commission order fixing minimum coal prices could be appealed by consumers who were directly and substantially injured thereby.

Respondent fails to mention by citation or otherwise that certiorari was granted in the *Associated Industries* case, at 319 U. S. 739, and that the Second Circuit's order was thereafter vacated by this Court at 320 U. S. 707.[3]

The petition for certiorari filed by the Solicitor General on behalf of the Bituminous Coal Commission is illuminating. The Government urged this Court to review the *Associated Industries* decision primarily because of the number of challenges to agency orders that threatened to clog the administrative process if the Second Circuit's decision were permitted to stand. Secondly, the Government contended that the Second Circuit had misconstrued the *Sanders* decision. Presumably because of concern for these factors, this Court granted certiorari.

Before argument could be had, however, the Bituminous Coal Act, 15 U. S. C. §§828 *et seq.*, expired. The Solicitor General moved that this Court reverse and remand to the Court of Appeals with directions to vacate its judgment and dismiss the appeal as moot. The respondent opposed that motion and cross-moved to dismiss the writ of certi-

[3] The court below was apparently unaware of this, although it relied on the *Associated Industries* case. The majority opinion did not refer to the further proceedings in this Court (Petition, p. 5a, R. 99).

orari as moot and to remand with directions to dismiss the action in the court below without prejudice. Associated Industries contended that the Court of Appeals' order was validly made at a time when the cause was not moot, and that this Court should not make any determination concerning the merits of that order. This Court, in a *per curiam* opinion, rejected respondent's arguments, *vacated* the order of the Second Circuit, and remanded the cause "for such further proceedings as may be appropriate" (329 U. S. 707). No further proceedings are reported.

It is respectfully submitted that the instant case is even more worthy of this Court's review than was *Associated Industries*, where the agency involved was in the process of dissolution and issued orders only on a sporadic basis. The Federal Communications Commission daily deals with applications such as those here involved. Renewal applications must be made every three years by each broadcast licensee for each license he holds. Moreover, because of the public importance of the broadcasting industry, the Commission is under a Congressional mandate to deal with all such applications expeditiously. 47 U. S. C. § 307 (d).

The remainder of respondent's argument consists of little more than the bald assertion that there is no conflict in the Court of Appeals' decisions discussed at pages 11 to 18 of the petition.

Although respondent does attempt to explain away the clear *intra*-circuit conflict shown in the petition (Res. Br., pp. 14-17), it fails to meet the following significant facts concerning the cases sought to be distinguished.

Pittsburgh Radio Supply House v. Federal Communications Commission, 98 F. 2d 303 (D. C. Cir. 1938), dismissed appeals by three existing station owners because their claims of electrical interference were too general, remote or insubstantial. *Mansfield Journal Co. v. Federal Com-*

munications Commission, 173 F. 2d 646 (D. C. Cir. 1949), and *KEAB Broadcasting Co.* v. *Federal Communications Commission*, 177 F. 2d 40 (D. C. Cir. 1949), dismissed appeals by applicants for licenses who at least had inchoate broadcasting interests. In each of these cases the person held to lack appellate standing had some interest in broadcasting, whereas respondent has no such interest, inchoate or otherwise.

WOKO, Inc. v. *Federal Communications Commission*, 109 F. 2d 665 (D. C. Cir. 1939), and similar cases implicitly overruled by the court below are symptomatic of the need for clarification of the "party in interest" concept by this Court.

In *Southwestern Publishing Co.* v. *Federal Communications Commission*, 243 F. 2d 829 (D. C. Cir. 1957), the company described by respondent (Res. Br., p. 17) as the actual party in interest was the wholly-owned subsidiary of the license applicant which was denied standing to appeal. Petitioner submits that, if an applicant for a broadcast license cannot trace its aggrievement through its wholly-owned subsidiary, *a fortiori* Philco cannot trace its alleged injury as a non-broadcaster through RCA to NBC.

Respondent's concluding contention (Res. Br., pp. 17-18) is in fact a recognition that Philco cannot seriously claim to be directly injured by the order it seeks to protest. Respondent argues that it is "splitting hairs" to distinguish between injury resulting from Commission action and injury resulting from a licensee's activities. This statement illustrates the basic fallacy of the holding of the majority below. Respondent, like the majority below, would do away with the language of the statute requiring that an appellant be "adversely affected by [an] order of the Commission", 47 U. S. C. §402(b)(6), and would abandon

any requirement that the injury giving rise to standing must be the direct and immediate result of the order challenged.

Finally, it should be noted that respondent makes no mention of the *inter*-circuit conflict which is apparent from a comparison of the decision below with *United States Cane Sugar Refiners' Ass'n* v. *McNutt*, 138 F. 2d 116 (2d Cir. 1943), and *Murphy* v. *United States*, 252 F. 2d 389 (7th Cir. 1958), discussed at pages 15 to 17 of the petition. No explanation is given for this curious omission.

Conclusion

The instant petition is this Court's first opportunity to pass on the important questions here presented and to dispel the existing conflict and confusion concerning who has standing to challenge Commission action. Accordingly, this petition should be granted as prayed.

Respectfully submitted,

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